85-1347 (5)

No. [redacted]

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

GEORGE F. RITCHIE,

Respondent.

On Writ of Certiorari to the
Supreme Court of Pennsylvania

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF

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EDITOR'S NOTE

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No. 85-1237

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MOTION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF

The Appellate Committee of the District Attorneys Association of California hereby respectfully moves for leave to file the attached brief of amicus curiae in this case. The consent of the

attorney for the petitioner has been obtained. The consent of the attorney for the respondent was requested but refused.

The Appellate Committee of the California District Attorneys Association is a committee created by the district attorneys of California to utilize and coordinate the resources of district attorneys' offices throughout the state, for the purpose of presenting their views on behalf of the People of the State of California in cases which may have a major statewide impact upon the prosecution of criminal offenses. Upon review of the instant matter, the Committee has concluded that the outcome of this case will have a substantial impact upon the administration of criminal justice throughout California should this Court hold that a defendant has a constitutional right of access to the presumptively

confidential records of a public agency pertaining to the alleged victim of sexual offenses. Accordingly, the Committee has decided to seek permission to file an amicus curiae brief herein. The Office of the District Attorney of the County of Los Angeles has been requested to prepare and submit this brief. The District Attorney of the County of Los Angeles is an authorized law officer of the county, which is a political subdivision of the State of California. (See Rule 36.4.)

In the instant case the Supreme Court of Pennsylvania has held that the Sixth Amendment right of confrontation includes the right of a defendant to have access to the presumptively confidential records of a public agency pertaining to the child-victim. That court overlooked United States v. Bagley, 105 S.Ct. 3375

(1985), a case which is inconsistent with the holding of the Pennsylvania court. Moreover, that court has not considered this Court's approval of the Jencks Act (18 U.S.C. §3500) as constitutionally valid, a point also inconsistent with the Pennsylvania Supreme Court's conclusion. It also appears that neither petitioner nor respondent has thus far considered the same matters. Hence it is submitted that the brief of amicus will be helpful to this Court.

For the foregoing reasons, our motion for leave to file the attached amicus curiae brief should be granted.

Respectfully submitted
on behalf of the Appellate
Committee of the California
District Attorneys Association

IRA REINER
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By

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Committee of the California
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BRIEF OF AMICUS CURIAE

Amicus Curiae, Appellate Committee of the California District Attorneys Association and Ira Reiner, District Attorney of Los Angeles County, submit this brief accompanied by motion for leave to file the same, pursuant to Rule 36.3.

INTEREST OF AMICUS CURIAE

The Appellate Committee of the California District Attorneys Association is a committee created by the district attorneys of California to utilize and coordinate the resources of district attorneys offices throughout the state, for the purpose of presenting their views on behalf of the People of the State of California in cases which may have major statewide impact upon the prosecution of criminal offenses. Upon review of the instant matter, the Committee has concluded that the outcome of this case will have substantial impact upon the administration of criminal justice throughout California should this Court hold that a defendant has a constitutional right of access to the presumptively confidential records of a public agency pertaining to the alleged victim of sexual offenses. Accordingly, the Committee has decided to

seek permission to file an amicus curiae brief herein. The Office of the District Attorney of the County of Los Angeles has been requested to prepare and submit this brief. The District Attorney of the County of Los Angeles is an authorized law officer of the county, which is a political subdivision of the State of California. (See Rule 36.4.)

SUMMARY OF ARGUMENT

Our argument is that the Pennsylvania Supreme Court has erroneously understood the Sixth Amendment right of confrontation as entailing the right of a defendant to have access to the confidential records of a public agency of the child-victim. This misinterpretation of the Sixth Amendment rests upon a misreading of Davis v. Alaska, 415 U.S. 308 (1974). Moreover, this supposed right is not required by due process of law since this court has upheld the validity of the Jencks Act (18 U.S.C.

§3500). The discovery permitted by the Jencks Act of statements made by government witnesses after their direct testimony does not include the right of independent access to government records for the defendant.

ARGUMENT

I

THE SIXTH AMENDMENT RIGHT OF CONFRONTATION DOES NOT INCLUDE THE RIGHT OF A DEFENDANT TO HAVE ACCESS TO THE PRESUMPTIVELY CONFIDENTIAL RECORDS OF A PUBLIC AGENCY PERTAINING TO THE COMPLAINANT

In the instant case, defendant was charged with sexual offenses involving his minor daughter. Prior to trial, defendant sought access to the confidential records of a public agency pertaining to the complainant in order to obtain information which might impeach or discredit

her, or which might reveal potential witnesses. On appeal from the judgment of conviction, the intermediate state appellate court concluded that there was a violation of defendant's Sixth Amendment rights due to the failure of the trial court to have allowed him access to his daughter's confidential records. That court determined that the appropriate remedy was to require that the trial court make an in camera inspection of the records, that the trial court make available to the defendant only those parts of the records which the trial court determined to constitute verbatim statements (or the equivalent) by the complainant, and that defense counsel be permitted access to the entire record reviewed in camera by the trial court in order to thereafter argue

relevance. The Pennsylvania Supreme Court also concluded that the trial court erred in refusing defendant access to the confidential records pertaining to his daughter. That court remanded the matter to the trial court with instructions that defendant, through his counsel, be granted access to such records. Counsel would then be permitted to argue to the trial court what use, if any, could have been made of the records in cross-examining the complainant or in presenting other evidence. The trial court was directed to vacate the judgment and grant a new trial unless it was convinced that any error was necessarily harmless.

The Pennsylvania Supreme Court concluded that the trial court erred in refusing defendant access to his daughter's confidential records because it found persuasive his argument that "his Sixth

Amendment rights require that he gain access to the entire file so that determinations concerning what information might be useful to the defense may properly be made by an advocate." (Commonwealth v. Ritchie, 502 A.2d 148, 150 (1985).) The opinion of the Pennsylvania high court discloses that that court reached its conclusion because of its interpretation of Davis v. Alaska, 415 U.S. 308 (1974). In Davis, this Court held that the Sixth Amendment right of confrontation required that a defendant be allowed to impeach the credibility of a prosecution witness by cross-examination directed at possible bias deriving from the witness' probationary status as a juvenile delinquent. Such cross-examination was permissible, this Court declared, notwithstanding that it would conflict with a state's asserted interest in preserving the confidentiality

of juvenile adjudications of delinquency. In the instant case, the Pennsylvania Supreme Court explained: "Since the use of that which is within the jurisdiction of the [trial] court must conform to the fundamental law of the land, the defendant's entitlement to [his daughter's confidential records] is therefore to be determined by those Sixth Amendment principles heretofore considered." (502 A.2d at 153.) The Pennsylvania high court significantly stated, "As in Davis, supra, we find that the Commonwealth's interest in maintaining the confidentiality of these records may not override a defendant's right to effectively confront and cross-examine the witnesses against him." (Id.) Thus because of its reading of Davis, the Pennsylvania Supreme Court determined that Ritchie had a Sixth Amendment right to inspect the presumptively

confidential records of a public agency pertaining to his daughter. This relief was held to be constitutionally required by the Pennsylvania Supreme Court in addition to the remedy, provided by the Superior Court of Pennsylvania, by which the trial court after an in camera inspection of the confidential records would make available to defendant only those parts which it determined to constitute verbatim statements (or their equivalent) by the complainant regarding abuse, in order "that their relevancy might be determined and their uses in testing credibility ascertained." (Commonwealth v. Ritchie, supra, at 150.)

Contrary to the Pennsylvania high court's position, we submit that the Davis opinion does not establish any principle by which the Sixth Amendment right of confrontation entails discovery

rights ~~for defen~~dants not already required by due process of law. As this Court has noted in Delaware v. Fensterer, 106 S.Ct. 292, 294 (1985), "This Court's Confrontation Clause cases fall into two broad categories: cases involving the admission of out-of-court statements and cases involving restrictions imposed by law or by the trial court on the scope of cross-examination." Clearly, the instant case is one which does not fall within either category.

What has happened is that the Pennsylvania Supreme Court overlooked this Court's decision in United States v. Bagley, 105 S.Ct. 3375 (1985). In Bagley, this Court declared that the failure of prosecutors to assist the defense by disclosing information that might be helpful in conducting cross-examination of prosecution witnesses amounts to a constitutional violation, requiring the reversal

of a resulting conviction, only if the evidence in question is material. Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. This Court in Bagley expressly rejected the view that the government's failure to disclose the requested impeachment evidence that the defense would use to conduct an effective cross-examination of prosecution witnesses requires automatic reversal because it threatened the defendant's right to confront adverse witnesses. (105 S.Ct. at 3380-3381.)

As this Court explained the matter in Bagley, supra, at 3381:

> Moreover, the [Court of Appeal's] reliance on Davis v. Alaska for its "automatic reversal" rule is misplaced. In

Davis, the defense sought to cross-examine a crucial prosecution witness concerning his probationary status as a juvenile delinquent . . . . Pursuant to a state rule of procedure and a state statute making juvenile adjudications inadmissible, the trial judge prohibited the defense from conducting the cross-examination. This Court reversed the defendant's conviction, ruling that the direct restriction on the scope of cross-examination denied the defendant "the right of effective cross-examination which 'would be constitutional error of first magnitude and no amount of showing of want of prejudice would cure.' [Citation.]" . . . .

The present case, in contrast, does not involve any direct

restriction on the scope of cross-examination. The defense was free to cross-examine the witnesses on any relevant subject, including possible bias or interest resultint from inducements made by Government. The constitutional error, if any, in this case was the Government's failure to assist the defense by disclosing information that might have been helpful in conducting the cross-examination.

The Pennsylvania Supreme Court, it is clear, misunderstood Davis when it concluded in the instant case that defendant's Sixth Amendment right of confrontation includes a discovery right, i.e., the right of the defendant to inspect the confidential records of his daughter. Having shown that the Pennsylvania high court

erred in this respect, we turn our attention to whether due process of law requires such discovery.

II

DUE PROCESS OF LAW DOES NOT REQUIRE THAT THE DEFENDANT HAVE THE RIGHT OF ACCESS TO PRESUMPTIVELY CONFIDENTIAL RECORDS CONCERNING THE COMPLAINANT

Due process of law does not require that the defendant in the instant case have the right of access to presumptively confidential records of the complainant. Due process of law, as we have seen, only requires that the prosecution disclose evidence, whether exculpatory or impeachment, to the defense only if it is material, i.e., if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. (United States v. Bagley, supra, at 3381.)

Hence permitting access for Ritchie to the entire confidential file of a public agency pertaining to his daughter is not required by due process of law. As this Court declared in Bagley: "An interpretation of Brady [v. Maryland, 373 U.S. 83 (1963)] to create a broad, constitutionally required right of discovery 'would entirely alter the character and balance of our present systems of criminal justice.' [Citation.] Furthermore, a rule that the prosecutor commits error by any failure to disclose evidence favorable to the accused, no matter how insignificant, would impose an impossible burden on the prosecutor and would undermine the interest in the finality of judgments." (105 S.Ct. at 3380 n. 7.)

Additionally determinative of the second issue, i.e., whether due process of law requires the discovery right in question, are the decisions of this Court

concerning the Jencks Act (18 U.S.C. §3500). Since its enactment in 1957, this statute "and not the Jencks decision [Jencks v. United States, 353 U.S. 657 (1957)] governs the production of statements of government witnesses for a defendant's inspection at trial."[1/]

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1. Rule 26.2, Federal Rules of Criminal Procedure, places in the criminal rules the substance of the Jencks Act with respect to the production of statements of defense as well as prosecution witnesses. Subdivision (a)(2) of Rule 16 provides that, with the exception of reports of examinations and tests as therein specified, the pretrial discovery authorized by Rule 16 does not pertain to "statements of government witnesses or prospective government witnesses except as provided in 18 U.S.C. §3500."

In Palermo v. United States, 360 U.S. 343, 353 n. 11 (1959), this Court assumed the validity of the Jencks Act with the statement:

> The statute as interpreted does not reach any constitutional barrier. . . . Much of the law of evidence and of discovery is concerned with limitations on a party's right to have access to, and to admit in evidence, material which has probative force. It is obviously a reasonable exercise of power over the rules of procedure and evidence for Congress to determine that only statements of the sort described in (e) are sufficiently reliable or important for purposes of impeachment to justify a requirement that the Government turn them over to the

defense.

Although subsection (c) of the Jencks Act specifically provides for an in camera determination in order for the trial court to rule on the government's claim that a witness' statement contains matter which does not relate to the subject matter of his testimony, this Court in Palermo expressed approval of the practice of having the Government submit the statement to the trial judge for an in camera determination of whether its production is compelled by the statute. This Court declared in Palermo that "[t]he Act's major concern is with limiting and regulating defense access to government papers, and it is designed to deny such access to those statements which do not satisfy the requirements of (e), or do not relate to the subject matter of the witness' testimony. It would indeed defeat this design

to hold that the defense may see statements in order to argue whether it should be allowed to see them." (360 U.S. at 354. Emphasis added.)

The validity of the Jencks Act was confirmed in Scales v. United States, 367 U.S. 203, 258 (1961). This Court additionally declared: "It is enough to say here that there can be no complaint by a criminal defendant that he has been denied the opportunity to examine statements by goverbment witnesses which do not relate to the subject matter of their testimony. . ." (Id.)

Given that this Court has upheld the validity of the Jencks Act, which limits discovery of statements of government witnesses who have testified at federal trials, it follows that due process of law does not require that the defendant in the instant case have access

to the confidential records of a public agency pertaining to his daughter.

CONCLUSION

For the foregoing reasons, amicus submits that the decision of the Pennsylvania Supreme Court remanding the matter to the trial court with instructions that respondent, through his counsel, be granted access to the confidential records pertaining to complainant be reversed. Sensitivity to the constitutional rights of persons accused of crime should not swamp, as it were, concern for the legitimate interests of the victims of crime, particularly juvenile victims of sexual offenses. It is disconcerting that the Pennsylvania high court has resolved an issue of discovery in a criminal prosecution by misunderstanding this Court's decisions in a matter of federal

constitutional law. It is even more disconcerting that, purportedly to vindicate the defendant's constitutional rights, he is to be given unrestricted access to those presumptively confidential records of a public agency pertaining to his daughter, the alleged victim of sexual offenses with which he has been charged and convicted. The scope of this discovery order is almost unbelievably broad for it extends to all the contents of the confidential records of the defendant's daughter. The value of her interest with respect to the most intimate aspects of her life has been reduced to nothing by the Pennsylvania Supreme Court. We urge that by vindicating her privacy, as well as that of the Commonwealth of Pennsylvania in justice, this Court will send a signal throughout the land that the rights of all defendants

can be adequately protected by the judicial system without subjecting the victims of crime to the trauma of disclosing information which has been given to governmental agencies in confidence.

Respectfully submitted on
behalf of the Appellate
Committee of the California
District Attorneys Association

IRA REINER
District Attorney of
Los Angeles County

HARRY B. SONDHEIM, Head
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ARNOLD T. GUMINSKI
Deputy District Attorney

Attorney for the California
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CERTIFICATE OF SERVICE BY MAIL

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849 South Broadway, 11th Floor
Los Angeles, California 90014

No: 85-1237
October Term, 1985

PEOPLE OF THE STATE OF
PENNSYLVANIA,

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GEORGE F. RITCHIE,

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed by the County of Los Angeles as a Deputy District Attorney, and I am a member of the Bar of the United States Supreme Court and representing the petitioner herein. My business address is 849 South Broadway, 11th Floor, Los Angeles, California 90014.

I have served the within MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF as follows: By placing three copies in a separate envelope addressed to:

BOB COLVILLE
District Attorney
County of Allegheny
303 Court House
Pittsburgh, Pennsylvania 15219
Attn: Edward Marcus Clark, Esq.

JOHN H. CORBETT, JR., ESQ.
Office of the Public Defender
County of Allegheny
1520 Penn Avenue
Pittsburgh, PA 15222

Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at Los Angeles, California, on the 8th day of August, 1986.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 8, 1986, at Los Angeles, California.

ARNOLD T. GUMINSKI